No. 82-1477

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY, *et al.*,
Appellants

v.

COMMITTEE TO SAVE NUKOLII, *et al.*,
Appellees

On Appeal From The Supreme Court Of Hawaii

NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY ASSOCIATION OF HAWAII, MAUI CONTRACTORS ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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April 1983

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The above-named trade associations respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of appellants.

The Associations have received written consent from appellants and from appellees County of Kauai and the Mayor of the County to file the brief and have filed the letters of consent with the Clerk of the Court. Appellee Committee has declined to grant consent.

The National Association of Home Builders represents approximately 105,000 builder and associate members

organized in 750 affiliated state and local associations in the fifty states, District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as remodelers and land developers. NAHB members construct 75 percent of all housing in the United States; residential construction, a $150 to $200 billion industry, employs 3.5 million people. The Building Industry Association of Hawaii has approximately 425 members that produce about 80 percent of the state's housing. The affiliated Maui Contractors Association has about 325 members, producing over 90 percent of Maui's housing. We are the voice of the American and Hawaiian shelter industry.

The International Council of Shopping Centers, Inc. is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 10,000 members, and the approximately 8,500 located in the United States represent a majority of the shopping centers in this country. The ICSC is the only United States trade association specific to shopping centers.

The Associations sincerely believe that the accompanying brief will greatly assist the Court because our concerns are broader than those of appellants, which focus their arguments on the Hawaii situation and the circumstances of their case, important as it is. The brief addresses public policy and development issues not addressed by appellants, and it relates those issues—concerning the

legal status and practical role of the "vested rights" doctrine in the United States, the national impact of zoning referenda on housing and the significance of the comprehensive land planning system—to the Constitution's due process and just compensation clauses.

The Associations have a fervent interest in maintaining reasonable certainty and fundamental fairness in the land development process, particularly where the process is long in time and complex in the nature and frequency of governmental approvals required, as is the case both in this appeal and frequently throughout the nation. Where that reasonable certainty is erased at the very end of the development process by a discretionary referendum, after construction has begun and millions of dollars have been expended based on good faith reliance on years of governmental approvals, basic constitutional rights are also erased, placing in jeopardy real estate development in those many states that have the referendum process.

If builders and developers cannot depend on a rational, comprehensive, nationally recognized land use system, one in which government works in concert with the developer to assure that all public plans, laws and requirements are met every step of the way, then the public policy in support of good and fair land use planning will be stood on its head. For not only will privately held investment-backed expectations be destroyed but also the public need for sensible predictability in the planning process. Unpredictability greatly impedes anyone from taking the expensive chance of initiating a building project and makes the providing of housing, especially multifamily or lower cost housing, which can be controversial even if legal, that much more difficult to achieve.

Our vital concerns and differing perspective regarding the constitutional protection to be accorded vested rights

are akin to the issues raised by the National Association of Home Builders in *amici* briefs filed in the zoning cases of *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981), *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) and *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). If vested or constitutional rights in governmentally-sanctioned developments are always to be at the capricious mercy of discretionary, plebiscitary revocation procedures no matter how late it is in the development process and regardless of the depth of prior commitments, then the ability of the housing industry to assist the nation in meeting its critical housing needs will be further hindered.

For the above reasons, this Motion should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state court can apply the result of a rezoning referendum to a specifically targeted, governmentally approved, ongoing building project, thereby revoking previously issued building permits, depriving the property owners of the right to complete their construction and effectively taking for public use their vested rights in the development, without violating the Constitution's Due Process and Just Compensation Clauses and Supreme Court rulings thereunder.

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INTEREST OF AMICI

The interest of *amici curiae* is set forth in the preceding motion for leave to file this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The fourteenth amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of . . . property, without due process of law. . . ."

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

This appeal is made necessary by a remarkable zoning opinion that does great violence to the Constitution and the public policy considerations raised below. Fundamental fairness in the use of land, a value of equity given meaning in the due process and just compensation clauses of the fifth and fourteenth amendments, has worth only so far as people can reasonably rely on official development approvals and the integrity of a state's comprehensive land use system. The court below, in a shockingly severe ruling with broad ramifications, has misconstrued and misapplied this Court's zoning and land use decisions to such a degree that repeated governmental approvals and a reasonably dependable land use system have been effectively reduced to constitutional tatters.

One thing this appeal is *not* is a challenge to the principle of *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)—that submitting rezoning applications to mandatory referenda does not violate the fourteenth amendment due process clause. Nor is this a case of development speculation in which someone assumed a business risk and lost fairly. As explained below, this case is very much unlike *Eastlake* because, here, among other salient differences, existing rights *are* being impaired, raising the just compensation issue as well. 426 U.S. at 679 n.13. This case is to *Eastlake* what *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928) (zoning ordinance as applied violates due process) is to *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning on its face comports with due process), what *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (housing ordinance defini-

tion of "family" violates due process) is to *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (zoning ordinance definition of "family" not unconstitutional), and what *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (zoning exclusion of live, adult entertainment violates first amendment) is to *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning regulation of adult theatres comports with first amendment).

I. Vested Rights And The Constitution

The concept of "vested rights" in the American land development process is analogous to the *res judicata* doctrine in our legal system. Both policies recognize the practical and equitable necessity for a finality of official, substantive decisions at the end of thorough, frequently complex, procedures.

Courts have long recognized the need to shield developers from changes in regulations governing the development process that would unfairly impede ongoing projects, resulting in wasted resources and unacceptably high risks for the development community, by invoking the doctrines of vested rights and equitable estoppel to bar application of the new regulations. The estoppel doctrine reflects equitable considerations, while the doctrine of vested rights has its origins in the constitutional realm. D. Mandelker, Land Use Law § 6.12 (1982); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-65. One noted commentator on vested rights has elucidated the distinction between the two intertwining doctrines as follows: "Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation." Hee-

ter, *supra* at 65; *see Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979). In a sense, then, vested rights is a noun while equitable estoppel is its verb. The former has little life without the latter.

> Why is the issue so critical now? One reason is that in the past decade or two, building projects have become larger, of longer duration, and more complex. The multiphase project extending over several years of construction is more exposed to alterations in public policy, while at the same time it requires more flexibility to cope with market changes. Also, it seems to be a fact of life that land use regulations are changing more often and more drastically than ever before. In this era of increasing sensitivity to environmental, design, conservation, and other concerns, there are growing pressures to regulate development more closely. In some jurisdictions, slowing or halting growth has become a topic of strong interest. These pressures have led in the past 10 years to more rapid changes in regulation and more restrictive regulations. With every change in plans, zoning boundaries, or land development regulations comes the probability of injury to property holders who expect to develop their properties according to the regulations which were in effect when they made their investments. C. Siemon, W. Larsen & D. Porter, Vested Rights: Balancing Public and Private Development Expectations 3 (Urban Land Institute 1982) (hereinafter cited as Urban Land Institute).

The potential for eventually securing vested property rights, protected ultimately by the due process clause and given expression by the equitable estoppel principle, helps overcome a landowner's natural reluctance to undertake development in an uncertain regulatory climate by giving him the assurance that regulatory changes occurring late in the game will not critically impair his substantial investment in a project. The crucial value of the vested rights doctrine in eliminating unnecessarily

arbitrary risks and interjecting a degree of certainty into the development process cannot be overstated. *See, e.g.*, Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L.J. 623 (1978); Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 Envt'l L. 519 (1977); Heeter, *supra*. *See also* American Law Institute, Model Land Development Code § 2-309 (1976) (codifying the vested rights rule). Generally, in order to accrue vested rights, a developer must have made substantial expenditures or otherwise committed himself to his substantial disadvantage in good faith reliance on some act of the government prior to the regulatory change. *See, e.g.*, R. Ellickson & A. Tarlock, Land-Use Controls 203-04 (1981); D. Mandelker, *supra* at ch. 6; Urban Land Institute, *supra* at 13; Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 St. Louis U.L.J. 219, 221 (1979).

The test, then, is fundamentally one of gauging whether development expectations have matured to the point of constituting constitutionally protected rights. *See* Urban Land Institute, *supra*. Affirmation of the constitutional stature of vested rights appears early in American law. In *Dainese* v. *Cooke*, 91 U.S. 580 (1875), a case whose facts and appellate posture are a nineteenth century version of the facts and posture of this appeal, this Court struck down a court order enjoining two builders from performing further work on their partially completed buildings and requiring removal of the structures because the Supreme Court could discern no clear threat to the public health, safety or general welfare. The opinion signals this Court's refusal to countenance the deprivation of investment-backed development expectations without due process absent compelling public ne-

cessity. And, of course, a substantial destruction of "investment-backed expectations," as we have here, readily becomes a *de facto* taking of private property for a public purpose, giving rise to the claim under the just compensation clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171, 3174-75 (1982); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 648 (1981) (Brennan, J., dissenting opinion); *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980); *Kaiser Aetna*, *supra* at 175; *Penn Central Transportation Co.* v. *City of N.Y.*, 438 U.S. 104, 124, 127-28 (1978).

The constitutional basis of vested rights has been noted in modern cases as well. *See, e.g., Aries Development Co.* v. *California Coastal Zone Conservation Commission*, 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315, 325 (1975); *Reichenbach* v. *Windward at Southampton*, 80 Misc. 2d 1031, 364 N.Y.S.2d 283, 291 (Sup. Ct.), *aff'd*, 372 N.Y.S.2d 985 (App. 1975). In particular, the Hawaii Supreme Court has observed the relationship between vested rights and fifth and fourteenth amendment guarantees both in this case and in other recent pronouncements on the vested rights issue, pronouncements upon which the appellants, County, its legal counsel and three state circuit court decisions had relied in this case. *County of Kauai* v. *Pacific Standard Life Insurance Co.*, 653 P.2d 766, 773, 779 (Haw. 1982); *Life of the Land, Inc.* v. *City Council*, 60 Haw. 446, 592 P.2d 26, 35 (1979) (*LOL I*); *Allen* v. *City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328, 329 (1977). Public policy demands some semblance of reasonable predictability in the land development process, and the further along a development proceeds in gaining all necessary governmental approvals, the more concrete, literally, a proposal shapes into reality, the stronger becomes the con-

stitutional notion of fundamental fairness to be accorded the particular landholder.

As Professor Tribe states, "We deal here with the idea that government must respect 'vested rights' in property and contract—that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." L. Tribe, American Constitutional Law § 9-1 (1978). *See, e.g.*, Urban Land Institute, *supra* at 4 (vested rights merit constitutional protection); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960); *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1514-15 (1978).

Like the question of when does a regulatory taking occur, no judicial consensus exists as to precisely when a development expectation ripens into a vested property right. But no court has ever gone as incredibly far as the lower court—to hold that after years of public planning and zoning actions, of many governmental approvals of appellants' site plans and various building permits and of the spending of millions of dollars, all culminating in lawful construction of condominium housing and part of a hotel, appellants possessed no property rights warranting protection because 20 percent of the number of the County's eligible registered voters in the last preceding election petitioned for a rezoning referendum, a referendum that occurred after final permits were issued and construction had commenced and in spite of an unambiguous grandfather clause in the County Charter (§ 5.11) that reads "A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum." *County of Kauai, supra* at 772.

Generally, courts hold rights vest when, say, substantial expenditures have been made by the applicant or a preliminary subdivision plan been approved or building permits been issued or construction begun on the ground. *See, e.g.*, 4 N. Williams, American Planning Law—Land Use and the Police Power § 111.02 (1975); Urban Land Institute, *supra* at ch. 3. Virtually all courts regard the commencement of construction as being the latest possible event to trigger the vesting of rights. Recent Developments, *Developers' Vested Rights*, 23 Urb. L. Ann. 487, 497 (1982). Professor Hagman remarks that rights should certainly vest when there are expenditures constituting a "social loss," such as physical changes on the ground or the placement of infrastructure, both of which occurred here. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U.L. Rev. 545, 574-75 (1979). Indeed, this case's litany of state and local governmental approvals—administrative, legislative, executive and judicial (except for the state high court reversal)—of every phase of appellants' housing and hotel project, from the general plan amendments in 1976 and 1977 through the rezoning from "agricultural" to "resort" use down to site plan approvals and the 1980 permit issuances, with increasing financial commitments by appellants every step of the way culminating in actual construction, makes the lower court's finding of no constitutional problem in the court's singular vesting rationale an aberration of the most extreme sort.

For appellants, as would any responsible developer, not only relied on consistent governmental assurances and the plain language of the County's § 5.11 grandfather clause but also the Hawaii vested rights rule in effect up until the date of the Hawaii Supreme Court's surprising opinion. That rule fixed the time of constitutional vesting as when "official assurances" are given by the govern-

ment to a landowner that a project may proceed. *Life of the Land, Inc.* v. *City Council*, 61 Haw. 390, 606 P.2d 866, 902 (1980) (*LOL II*); *LOL I*, *supra* at 35-36; *Allen*, *supra* at 330; *Denning* v. *County of Maui*, 52 Haw. 653, 485 P.2d 1048, 1051 (1971); *see* Urban Land Institute, *supra* at 26-27; Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979). Appellants had "official assurances" in spades, so much so that the County joined the developers as this case made its way through the state courts. Even the state supreme court had to concede that the last discretionary permit action by the County was on April 9, 1980, a full seven months before the referendum election that revoked appellants' February 1979 rezoning. *County of Kauai*, *supra* at 775.

During the period preceding the referendum vote, appellants proceeded with development at a pace completely consistent with proper business practice, incurring approximately $4.3 million in costs and constructing and dedicating to the County several expensive public improvements as a condition to obtaining certain governmental approvals. By the time of the Hawaii Supreme Court decision in 1982, almost $50 million had been invested in the project. Jurisdictional Statement at 4-5, 11-12. No builder, given the overwhelming circumstances of this case as underscored by three trial court decisions and a county attorney's opinion that the law was as everyone thought it was, would invest substantial time and money on a housing project, particularly one that might be controversial, if he thought for one moment that it could all be taken away capriciously and retroactively with no regard given to his rights to due process and just compensation.

II. Zoning Referenda And The Constitution

The impact of the decision below goes far beyond the State of Hawaii. Referenda and initiatives have become quite prevalent recently, occurring in most of the states of the union. Note, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 Urb. L. Ann. 135, 136 n.8 (1981). Builders are continually subject to construction by plebiscite, especially if the proposed housing is of lower cost or higher density than those supporting a referendum or initiative would prefer to see.[1]

But while the referendum procedure approved in *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), was part of the regular development process in that city, in this case, it had all the predictability of a lightning bolt. It is this element of unpredictability that builders dread most because if the rules can change at any time, *with no protection given to those development rights that have already vested*, then little that is innovative or different or often socially desirable will ever come to fruition. That which is worth doing, always attendant

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[1] For example, in a recent California case that is almost the mirror image of this case (except for no "taking of vested rights" issue), an apartment development aimed at moderate income families, though complying with the city's general plan and zoning ordinance and which was specifically approved by the city government, was later subject to an initiative petition to rezone the property. The petition, as in this case, was initiated by a neighborhood association for the sole purpose of defeating the already approved development. The voters adopted the initiative, and the city refused to issue building permits. In *Arnel Development Co.* v. *City of Costa Mesa*, 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981), the court held the initiative ordinance unconstitutional as an arbitrary and discriminatory rezoning in excess of the city's police power because the ordinance was not rationally related to the general welfare but only to serving the narrow interests of nearby property owners.

with some risk and usually at substantial up-front costs, will not get done because calculating the chance of success becomes a near impossibility even if one complies with all applicable planning, zoning and development controls.

In *Eastlake*, the only constitutional issue was that of due process because the zoning on the developer's land was the same from the day it was purchased through the referendum vote, which denied a rezoning—the land's use *never* changed. In *Kauai*, however, the developers' land was rezoned 21 months before the referendum election, which sought to undo retroactively the rezoning, and the subject property *physically changed* from agricultural use to 150 completed condominiums and a partially-built hotel. This Court said of *Eastlake*, "[t]he situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to *change* a reasonable zoning restriction. No existing rights are being impaired. . . ." 426 U.S. at 679 n.13. In *Kauai*, however, we have an unmistakable issue of a taking of vested rights without just compensation in addition to an aggravated due process issue.

In *Eastlake*, every rezoning adopted by the city council had to be put before the voters for approval or rejection within 120 days of its passage. In *Kauai*, however, between certification of a referendum petition and the next general election, *two years* could pass. And because the Hawaii Supreme Court held that no governmental or private development action, up to and including construction, could serve to vest rights between certification and election, an unconscionable delay in a project's life would ordinarily result, a delay that could commence at any time since the state high court clearly implied that a referendum petition could be certified no matter how far along to completion a project was.

For while the referendum in *Eastlake* was mandatory, a part of the regular development process that everyone could take into account, the *Kauai* procedure is wholly discretionary, triggered when a mere 20 percent of the number of the County's voters in the last preceding election petitions for a referendum. Thus a small minority, late in a development's life, can interrupt an orderly process and effectively freeze an officially approved development for up to two years. The Hawaii Supreme Court's simple citation of *Eastlake* as support for its interpretation of the constitutionality of such a capricious procedure is a gross distortion of what the due process, and just compensation, clauses stand for and of what *Eastlake* means.

The Hawaii rule wreaks havoc on reasonable business practice, putting any builder in a "Catch-22" vise—despite all necessary approvals, he cannot rely ultimately on them but is left to speculate as to the outcome of a *possible* referendum that may or may not block completion of a *commenced* development. If a petition is certified, the builder is forced to gamble during the waiting period up to election day. Any further expenditures on his development will be completely wasted if he wrongly guesses that his zoning will not be taken away. Conversely, he will incur costly delays if work is suspended until the election results are final. It is an untenable position in which to be placed—to be denied both a fair and reasonably consistent building process and, at the same time, any rights to what one has legally earned while depending on that process. Under the Hawaii vested rights ruling, both developers and reviewing governments, by being so subject to the whim of a distinct minority, are asked to abandon the rational land use process upon which the general welfare *should* depend.

A reasonably predictable land use system insures fundamental fairness in the development scheme by simultaneously protecting individual rights and promoting the public's welfare. Comprehensive government planning is the backbone of any competent, responsible system, lending coherence and discipline to efficient, orderly land regulation. *See, e.g.*, D. Mandelker, The Zoning Dilemma 57-70 (1971); Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 899 (1976); Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 Urb. L. Ann. 33 (1975). A major report by the American Bar Association's Advisory Commission on Housing and Urban Growth recommends that the newly complex nature of American land regulation demands special fairness and rationality and advocates comprehensive planning "to insure internal *consistency*, to provide *predictability*, and to *reduce* the tendency toward *arbitrary* local decisionmaking." Housing for All Under Law—New Directions in Housing, Land Use, and Planning Law 323, 408 (R. Fishman ed. 1978) (emphasis added). The very existence of a plan gives assurances that the administration of land use regulation will not serve sheer "private or parochial community interests." R. Nelson, Zoning and Property Rights—An Analysis of the American System of Land-Use Regulation 79 (1977). Writes Richard Babcock, "[t]o the citizen or landowner, the content of the plan is no more important than is the function of the plan to assure openness, predictability, and impartiality in the public decisions that implement the plan." The Zoning Game 134 (1966).

The supreme irony of the Hawaii decision is that it stands on its head what Professor Mandelker proudly

calls the most rigorous land development system in the world, one in which Hawaii ties planning to zoning more closely than any state in the union. Mandelker & Kolis, *Whither Hawaii: Land Use Management in an Island State*, 1 U. Haw. L. Rev. 48, 48 (1979); Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 Urb. Law. 781, 801 (1982). Indeed, the high importance of comprehensive planning, of dependable land use management and regulatory controls, are the keys to understanding the Hawaii system's careful focus on good planning and fair process. *See, e.g.*, D. Mandelker, Environmental and Land Controls Legislation 269-322 (1976); Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979); Lowry, *Evaluating State Land Use Control: Perspectives and Hawaii Case Study*, 18 Urb. L. Ann. 85 (1980).

Notwithstanding the manifest integrity of the state system, one that is repeated to varying degree throughout the nation and one that has been, until the opinion below, kept in reasonably good stead by the strictures of the Constitution's due process and just compensation clauses, the lower court has chosen to ignore that system. It has chosen to ignore the explicit words and obvious public policy of the County Charter's § 5.11 grandfather clause regarding vested rights and zoning referenda. It has chosen, finally, to ignore the fifth and fourteenth amendments. The lower court, by stripping appellants of their vested rights and misapplying *Eastlake* to the egregious circumstances at hand, has created an anomaly—government officials cannot rely on their public planning and regulatory scheme to guide future growth, and developers can never be assured that they will be able to complete a project once started.

III. Due Process And Just Compensation Redux

At bottom, this case is like two trains traveling along two parallel tracks—the development track and the referendum track—in which the switch that keeps them apart once property rights have vested, the County Charter's pellucid grandfather clause, was inexplicably pulled by the Hawaii Supreme Court, causing a collision of constitutional magnitude. The self-admitted harshness of the court's action, *County of Kauai*, *supra* at 780, is particularly bewildering because legislative devices such as grandfather clauses have been specifically recommended as a fair and orderly way of protecting vested rights from unconstitutional incursions. Urban Land Institute, *supra* at 4. If due process in zoning means anything, it means providing "fundamental fairness" to the aggrieved individual. *City of Eastlake*, *supra* at 694-95, 680 (Stevens & Brennan, JJ., dissenting, and Powell, J., dissenting).

Equal to that fairness concept is the constitutional principle that "justice and fairness" requires just compensation for harsh economic injury sustained by public action. *San Diego Gas & Electric Co.*, *supra* at 656, 660 (Brennan, J., dissenting opinion); *Agins*, *supra* at 263; *Kaiser Aetna*, *supra* at 175; *Penn Central*, *supra* at 124. How much harshness is required before compensation is called for, how far is "too far" before a regulatory action will be recognized as a taking, "necessarily requires a weighing of private and public interests." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *Agins*, *supra* at 261.

In *Kaiser Aetna*, a Hawaiian regulatory taking case similar to the case at bar, this Court found a remedy in the just compensation clause for the conversion of a private resort pond into a public aquatic park after the developers "had invested millions of dollars" on their marina sub-

division. *Kaiser Aetna, supra* at 169, 176. The substantial "interference with reasonable investment backed expectations" that occurred in *Kaiser Aetna* (at 175), a key factor for determining when a taking transpires, was certainly no different in degree than the virtual wipeout of appellants' multi-million dollar investment in an ongoing housing and hotel project rezoned retroactively to "agricultural" use. *See generally* D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1978).

A developer decides to build a project based on justifiable expectations of costs from land acquisition and financing through construction and sale or rental. Increased costs of unnecessary delay once a project is underway, coupled with the uncertainty of completion despite compliance with all development laws, creates an enormous disincentive, leading eventually to further abandonment of those projects needed to house a growing and diverse population. In this instance, the developers were building condominiums and a hotel. In other situations, such as *Arnel*, the housing under attack is on small lots or are apartments or townhouses or is marketed toward lower income citizens. In the volatile, mischievous scheme created by the lower court's ruling, in which the fifth and fourteenth amendments must give way to the whim of a few, what prudent builder, with something valuable but different to offer, would even risk entering such a market?

What worth have rights that one may have them deprived and taken for no better reason than that which is politically popular?

CONCLUSION

For the above reasons, this Court should note probable jurisdiction.

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